No. 83-1474

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HARRIS-TEETER SUPER MARKETS, INC.,

Petitioner

v.

PAUL LILLY, individually and on behalf of all others similarly situated

and

CHRISTOPHER McKINNEY, ET AL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

When a corporate employer, over a period of years and in the normal course of the operations of a sizeable business enterprise, has discharged numerous employees, both white and black, individually and for varied and separate causes and

reasons, and thereafter in a suit under 42 U.S.C. §§1981 and 2000e-2 it is shown numerically - but without trial of the causes and circumstances of the individual discharges - that the number of white employees discharged was 586 and the number of black employees discharged was 229 and that the proportion of white employees who were discharged was 21 percent and the proportion of black employees who were discharged was 37.2 percent - do such statistics establish a legal presumption that each and every discharged black employee was discharged "because of" being a black person?

LISTING OF ALL PARTIES IN THE CASE

The Plaintiffs in the case are as follows: - Paul Lilly, individually and on

behalf of all others similarly situated, Christopher McKinney, John LeGrand, Ken Bailey, Frank Sullivan, James Mobley, Jerome Gary, Curtis Jones, Roy Torrence, John Johnson, Willie Hunt, Roosevelt Patterson, Willie Covington, Michael McVay, Richard Gregory, individually and on behalf of all others similarly situated, Edward Porter, individually and on behalf of all others similarly situated, Phillip Reed, Shirley Gatewood, Woodrow McManus, Hazel Fisher, William Carrothers, Tresevant Goodwin, Richard Burch, Mack Ervin, Barbara Anderson, Austin Pharr, and Therrell McMoore.

The Defendant in the case, now Petitioner in this Court, is Harris-Teeter Super Markets, Inc.

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OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals is published at 720 F. 2d 326 (4th Cir., 1983), and is also printed in the separate Appendix which is filed herewith at pages 3-54.

The Findings of Fact and Conclusions of Law and Judgment of the District Court are printed in the separate Appendix which is filed herewith at pages 55-201.

JURISDICTION OF THIS COURT

The opinion of the Court of Appeals, embodying its decision and judgment, is dated October 14, 1983, and was entered on that date.

Thereafter within apt time, the Petitioner filed with the Court of Appeals a Petition for Rehearing and Suggestion

for Rehearing en banc, which was denied on December 7, 1983. The filing of this Petition for Certiorari is within ninety days from the date of such denial of rehearing.

Jurisdiction to review the decision of the Court of Appeals by writ of certiorari is conferred on this Court by the provisions of 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like

punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C. §1981

" It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ."

42 U.S.C. §2000e-2

STATEMENT OF THE CASE

The Petitioner believes that everything pertinent to a statement of the case is set forth elsewhere in this Petition in the

"Question Presented for Review" and in the "Reasons for the Granting of a Writ of Certiorari" - and in the interest of brevity need not be repeated at this point.

REASONS FOR THE GRANTING OF A WRIT OF CERTIORARI

It is respectfully submitted that in this case the ruling of the courts below, with regard to employee discharges,[1] undertakes to endow mathematical percentages with a potence and consequence which they do not, in logic and reason, have - and which they should not, in law, be given.

As is indicated above, in the "Question Presented for Review", each and every one of the 229 black persons, individually discharged

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[1]The only aspect of this case involved in this Petition for Certiorari is that of employee discharges.

by the Petitioner in the course of its business operations over a period of approximately five years, is by decision, judgment and order in the courts below (5, 55, 184)[1] presently declared entitled to reinstatement and back pay and "front pay" and fringe benefits, plus interest and costs and expenses and attorneys' fees (185-199).

Such ruling has been entered in behalf of these 229 persons without exploration or even inquiry as to the causes or reasons or circumstances of their respective discharges.[2] Indeed, it is a ruling rendered without even a nod of deference in the direction of the

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[1] Unless otherwise indicated, all page references are to the separate printed Appendix which accompanies this Petition.

[2] Except as to two of the total 229 discharged black employees. These two individual exceptions will be hereinafter specifically discussed.

central enactment of the very statute upon which this suit is brought. The entire theme and thrust of this statute, 42 U.S.C. §2000e-2, is individualized. It calls for proof of discrimination against an individual "because of such individual's race". Specifically this statute provides that it shall be "unlawful" . . . "to discharge any individual" . . . "because of such individual's race."

Yet in the present case, the Petitioner is confronted with a drastic judgment and order pertaining to the individual discharges of 227 persons - that is, the 229 referred to above, minus the only two individuals as to whose discharges any testimony or evidence has been brought forward. As has been emphasized, such discharges took place over a period of

years, in numerous and varied individual circumstances.

However, not a word of testimony nor any shred of evidence has been presented with regard to the cause or circumstances of the discharge of any of the 227 individuals. In short, there has been no proof whatever that any one of "such" individuals was discharged "because of such individual's race". It is submitted that the essential and fundamental requirement of the very statute which the plaintiffs invoke has thus been ignored.

In every case under 42 U.S.C. §§1981 and 2000e-2, whether termed a "disparate treatment" case or a "disparate impact" case, it is clear that in the final analysis, intent and purpose to discriminate "because of race" must be proved. It is

so commanded in 42 U.S.C. §2000e-2. If, for example, employees "A" and "B" are of different races, but their employer is totally and genuinely unaware of that and discharges one of them, the employer obviously cannot be held to have discriminated between "A" and "B" "because of" race and therefore cannot be held in violation of 42 U.S.C. §2000e-2.

The Petitioner recognizes of course that, as on any other issue of motive or purpose, an intent and purpose to discriminate "because of race" may be circumstantially and inferentially proved. Such is the situation in cases like Griggs v. Duke Power Company, 401 U.S. 424 (1971), the leading case in the realm of so-called "disparate impact" violations of this statute. There, a certain educational requirement or standard, applied on identical terms to all applicants for

employment, was found to have no relation to the employer's operational needs, but to be, however, to the employer's knowledge clearly more of an exclusionary barrier to blacks than to whites. The use of such a requirement in such circumstances was therefore held to be proof of an intent to discriminate "because of" race.

What the Petitioner is here seeking to emphasize, however, is that in no case under 42 U.S.C. §2000e-2 - whether it be termed a "disparate impact" or a "disparate treatment" case - can plaintiffs succeed without proving intent or purpose on the part of the employer to discriminate against plaintiffs "because of" their race. Since there has been here, with regard to the individual discharges of the 227 former employees, no testimony or evidence which

even addresses this proof requirement of the statute, it remains to examine just what evidence does the judgment in behalf of these 229 individuals purport to stand upon.

The evidence upon which the plaintiffs place their reliance consists of a brief tabulation showing, as hereinabove stated in the "Question Presented for Review", that during the years here in question the defendant Company discharged 586 white employees and 229 black employees, and that the proportion of white employees who were discharged was 21 percent and the proportion of black employees who were discharged was 37.2 percent (108-109). There was thus a numerical imbalance or disparity, in that the percentage of discharges among the black employees was

16.2 points higher than was the percentage of discharges among the white employees.

But how do these figures prove that any black employee was discharged "because of such individual's race"? Above all - and more to the point of the present case - how do these figures establish that each and every black employee discharged at this Company over a period of five years must be legally presumed to have been discharged "because of" his being a black person?

The Court below, upon learned statistical analysis, concludes that "the disparity between black and white" discharge percentages "was not due to chance, but instead to some other cause" (41). The Petitioner certainly agrees with that statement - except that the phrase "other

cause" would be more likely accurate if expanded to read "other cause or causes". In its next sentence, however, the Court takes a quantum leap and declares - "That cause is presumed to be unlawful discrimination".

It is certainly not the Petitioner's position or contention that "chance" determines discharges in its operations. It is the position and contention of the Petitioner that it discharges employees for causes arising out of the efficiency and productivity needs of its business. Its understanding is that under the jurisprudence of this Nation, it is not to be legally presumed to have discharged any person for other and unlawful reasons unless proof has been presented that it has done so. Proof has not been so presented as to any of the 227 individuals involved in this case.

Why or wherein does logic or reason or law call for a presumption that imbalance or disparity "between black and white" discharge percentages is due to "unlawful" cause and not to any other and lawful cause or causes of discharge? Beyond that, the Petitioner would respectfully ask do not logic and law and common sense alike reject the incredible presumption which has been declared in this case, namely, that <u>each</u> and <u>every</u> black employee discharged by this Company over a period of five years was discharged "<u>because</u>" he or she is a black?

Perhaps recognizing the anomalies of this situation, the court below says that the "statistical evidence" of imbalance, as between the "black and white" discharge percentages, is "sufficient to support" the legal presumption here in question "when

combined with the specific instances in which" the Company's discharge or disciplinary "discretion was unevenly exercised" (41). Yet when these "specific instances" are examined, they turn out to be vague and conclusionary statements by a single witness to the effect that there had been warnings or disciplines to black employees for tardiness or absence, while white employees had not been warned or disciplined for even worse tardiness or absence. The witness did not state whether he knew of such instances of his own knowledge or by rumor or hearsay. Such evidence would seem to be meager contribution indeed toward a case of any nature against this Company.

The record shows that the only "instances" of any asserted wrongdoing on the part of the Company regarding any

disciplinary or termination matters is that of the discharges of the two employees hereinabove referred to. The Court of Appeals refers to these two discharges as "instances in which" the Company's discretion "was unevenly exercised" as between blacks and whites (41). Yet neither of these discharges involved any showing whatever that in similar circumstances a black employee was discharged and a white employee was not discharged.

The Company presented full explanation and evidence as to why it discharged each of the two black employees, but it realizes that it can hardly expect this Court, at its level, to reexamine the details and merits of the discharge of these individuals. What the Petitioner does urge is that no matter the outcome of those two individual cases, they

cannot rightly or justly be given any effect of establishing a legal presumption that the Company discharged 227 other black employees - as to none of whom have the courts below either seen or heard one word of evidence regarding the circumstances and causes of their respective discharges.

The "imbalance" concept being in truth the ground upon which the courts below have undertaken to declare a legal presumption that each and every one of the 227 black employees individually discharged by the Company over a period of five years was discharged "because" he or she was a black, it remains to consider the further startling consequences of this concept. Under such a ruling, the only way that an employer, employing persons of different races, can avoid being in violation of

Federal law is by constantly and carefully seeing to it that there is no significant imbalance whatever in the numbers of the persons of different races whom he deals with in any aspect of employer-employee matters - whether in hirings, promotions, discharges or what not.

This is so because 42 U.S.C. §2000e-2 applies alike and with absolute impartiality to persons of each and every race. Thus, for example, in every operation employing both black and white persons, if significant imbalance develops adversely to whites, whether in hiring or promoting or discharging, the employer would be in violation of law - just as truly as if such imbalance developed adversely to blacks in any of these respects. Similarly, if for example, imbalance developed adversely

to whites in hirings, and adversely to blacks in promotions, and then adversely again to whites in discharges, the employer would have become hopelessly entangled in "imbalance" violations of Federal law.

Such a situation may seem - and indeed is - absurd. Nonetheless, it follows logically and inevitably from the theory upheld in this case, namely, that numerical imbalance as between races in any aspect of employer-employee relations creates legal presumption of employer liability to each and every person on the adverse side of the imbalance.

It is obvious that the subject of proof under 42 U.S.C. §2000e-2 is, as exemplified by the rulings of the courts

below in this case, in a state of serious disarray which needs and requires correction and guidance from this Court.

Upon all of the foregoing, it is respectfully submitted that this Petition for Certiorari should be granted.

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